No. 15-105

IN THE

SUPREME COURT OF THE UNITED STATES

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Court should grant certiorari and supplement the questions that the petitioners presented with an additional question:

Whether the Departments of HHS, Labor, and Treasury have the interpretive authority to craft a religious "accommodation" pursuant to the ACA's "preventive care" mandate.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. Cato has been indefatigable in its opposition to laws and executive actions that go beyond constitutional authority, regardless of the underlying policy merits.

Amicus submits this brief to alert the Court to a potentially alternate ground for resolving this case: If the Departments of Health and Human Services, Treasury, and Labor lack the interpretive authority and "expertise" to promulgate the religious accommodations at issue here, then the petitioners must simply be exempted from the "preventive care" mandate pursuant to the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). The Court should thus supplement the questions that the petitioners presented to resolve whether the administrative accommodation is consistent with the Departments' interpretive authority under the ACA.

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[1] Rule 37 statements: All parties were timely notified and filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

This case can be resolved without further engaging in the delicate analysis required by the Religious Freedom Restoration Act. In *Burwell v. Hobby Lobby Stores*, the Court held that regulations implementing the Affordable Care Act's "preventive care" mandate violated RFRA for certain closely held corporations. 134 S.Ct. at 2785. The petition here focuses on the legality of a religious "accommodation" to the same "preventive care" mandate for certain religious non-profits. It was promulgated by the Departments of Health and Human Services ("HHS"), Labor, and Treasury ("Departments"). Before addressing RFRA, however, the threshold question is whether the Departments had the requisite interpretive authority and "expertise" to resolve this "major question" of profound social, "economic and political significance." *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) (citing *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014) ("UARG") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))). If they do not, *Hobby Lobby* provides the rule of decision and petitioners must be exempted from the mandate. The Court should supplement the questions presented by the petitioners to resolve this foundational issue.

The Affordable Care Act requires that all qualified employers must provide "with respect to women . . . preventive care . . . as provided for . . . by the Health Resources and Service Administration." 42 U.S.C. § 300gg-13(a)(4) (the "preventive care" mandate). HRSA determined, and HHS agreed, that "preventive care" should be interpreted to include all FDA-approved contraceptives. Reacting to public

outrage, HHS recognized that the mandate—for which Congress did not carve out any conscience exceptions as it did for other ACA provisions, such as the individual mandate—would compel certain employers to pay for medical treatments that conflicted with the exercise of their religious beliefs.

In response, the Departments took two decisions to balance religious liberty with their delegated authority to mandate coverage of "preventive care." First, they automatically exempted certain "religious employer[s]"—limited to houses of worship and their auxiliaries—from the mandate; their employees would not receive contraception coverage. 76 Fed.Reg. 46623. Second—and at issue in this petition—they created an "accommodation" to the mandate for other religious employers. By objecting to the mandate, and providing information about their insurers, the organizations are not required to pay the cost of the objected-to contraceptives, but their employees still receive coverage. The Departments do not claim that either the exemption or the accommodation was compelled by RFRA or the First Amendment. Instead, they claim that 42 U.S.C. § 300gg-13(a)(4), among other related provisions, provides the statutory authority to decide which religious organizations should be exempted, and which should be burdened by the accommodation.

But this religious accommodation is not consistent with the Affordable Care Act's "preventive care" mandate. When Congress is silent on how religion should be accommodated, executive-branch agencies do not get *carte blanche* to pick among religious groups that should be exempted from a mandate that imposes a substantial burden on free exercise, nor can they fashion ad hoc

accommodations. Congress could certainly legislate an accommodation in this area, but this same action becomes *ultra vires* if taken by an agency lacking interpretive authority to make such profound decisions. "It is especially unlikely that Congress would have delegated this decision to" the Departments, "which ha[ve] no expertise in crafting" religious accommodations "of this sort" without clear statutory guidance. *King*, 135 S.Ct. at 2489 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006)).

Further, the Departments' justifications for their accommodation strategy reflects their blinkered approach to protecting religious free exercise. The Departments offered the exemption to houses of worship but not associated organizations based solely on the conclusory assertion that employees of the latter are "less likely" than the former "to share their employer's . . . faith." 78 Fed.Reg. 39887. That HHS refused to exempt people who work for the Little Sisters of the Poor—a group of nuns who vow obedience to the Pope!—is a testament to how out-of-their-league the Departments were in evaluating and responding to burdens on religion. The fact that the rulemaking is premised not on health, labor, or financial criteria, but on the Departments' own subjective determination of which employees more closely adhere to the religious views of their employers, "confirms that the authority claimed by" the Departments "is beyond [their] expertise and [is] incongruous with the [ACA's] statutory purposes and design." *Gonzales*, 546 U.S. at 267.

Moreover, the Departments' decision regarding whether and how to offer religious accommodations is the quintessential "major question" of profound social, "economic and political significance." *Brown &*

Williamson, 529 U.S. at 1315. *Cf. Gonzales*, 546 U.S. at 266-67 (2006) ("The structure of the [Controlled Substances Act], then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise."). Here the agencies are "laying claim to an extravagant statutory power" affecting fundamental religious liberty interests—a power that the ACA "is not designed to grant." *UARG*, 134 S.Ct. at 2444. The Departments' discovery of this "unheralded power" to decide which religious groups should and should not be exempted from a mandate that otherwise violates RFRA must be "greet[ed] . . . with a measure of skepticism." *Id.*

Finally, neither the express delegation to interpret "preventive care," nor the broad goals of improving "public health" and "gender equality," *Hobby Lobby*, 134 S.Ct. at 2779, can be used to justify a great substantive and independent power to rewrite congressional mandates in light of religious objections. Even if a statute is ambiguous, ad hoc administrative accommodations—as opposed to exemptions compelled by RFRA—cannot possibly be a "permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). "The idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the" broad purposes of the ACA "is not sustainable." *Gonzales*, 546 U.S. at 266-67. The accommodation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). If the FDA's attempt to regulate tobacco in *Brown & Williamson* was "extraordinary," 529 U.S. at 159, then the Departments' decision to craft religious accommodations touching on profound questions of conscience is *far beyond* "extraordinary."

ARGUMENT

I. The Court Should Consider Whether the ACA Affords the Departments of HHS, Labor, and Treasury the Interpretive Authority to Craft the Religious Accommodation

Before resolving the question of whether the accommodation at issue here violates RFRA, the Court must first address whether it is consistent with the interpretive authority delegated to one or more of the Departments by the ACA's "preventive care" mandate. (If it is not, *Hobby Lobby* controls and petitioners must be exempted from the mandate.)

The source of this purported authority is an instruction to interpret what types of "preventive care" must be provided by employers. But this delegation cannot justify an authority to craft exemptions that end up relieving the burden on religious liberty for some organizations and not others. Nor can it justify administrative judgment calls regarding what sorts of accommodations impose "minimal" burdens on the free exercise of religion, 78 Fed.Reg. 39887, or avoid implicating an organization in the commission of sin. These are not matters that are tacitly and cryptically delegated to federal agencies. The Departments' aggrandizement of their own power in this manner, absent any statutory authorization, conflicts with Congress's longstanding control over issues of religious conscience.

A. The Departments Interpreted "Preventive Care" as a Source of Authority for Religious Exemptions and Accommodations

The ACA provides that "with respect to women," an employer's group-health-insurance coverage must furnish "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA)" without cost sharing. 42 U.S.C. § 300gg–13(a)(4). Congress, however, did not define what constitutes "preventive care." Instead, "HRSA developed recommendations in consultation with the Institute of Medicine (IOM)." *Hobby Lobby*, 134 S.Ct. at 2788 (Ginsburg, J., dissenting) (citing 77 Fed.Reg. 8725–8726). IOM "convened a group of independent experts, including 'specialists in disease prevention [and] women's health.'" *Id.* The experts—none of whom had any qualifications in the area of religion or theology[2]—"determined that preventive coverage should include the 'full range' of FDA-approved contraceptive methods." *Id.*

HRSA promptly adopted IOM's recommendations. *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines. These guidelines provide that nonexempt employers are required to provide coverage for "[a]ll Food and Drug Administration approved contraceptives, sterilization procedures, and patient education and counseling for

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[2] Indeed, "religion," "faith," "conscience," and other similar words do not appear anywhere in the 250-page report. Institute of Medicine, *Clinical Preventive Services for Women* (July 19, 2011), https://iom.nationalacademies.org/Reports/ 2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

all women with reproductive capacity." *Id.* The HRSA guidelines applied equally to *all* qualified employers, without any regard for how the mandate would affect the free exercise of religion.

Over the next two years, the Departments developed two approaches for balancing religious-liberty interests with their congressional charge to expand access to "preventive care." First, they automatically exempted "religious employer[s]" from the mandate; their employees would not receive contraception coverage. 76 Fed.Reg. 46623. Initially, the Departments adopted a particularly narrow scope for this exemption, limiting it to an employer that "(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization." *Id.* The Departments noted that this exemption was "based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services." *Id.* Ultimately, to "simplif[y] and "clarif[y]" the regulations, the first three limitations were eliminated, so the exemption was effectively extended to cover to all churches and their integrated auxiliaries. 78 Fed.Reg. 39874 (citing 26 U.S.C. §§ 6033(a)(3)(A)(i) or (iii)). Organizations that met these criteria did not need to take any affirmative steps to receive the exemption.

The Departments created this exemption because they claimed it "respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed.Reg. 46623. During oral argument in *Hobby Lobby*, in response to a question about whether "Congress can give an

agency the power to grant or not grant a religious exemption based on what the agency determined," the Solicitor General explained that the exemption was offered to take into account "the special solicitude that churches receive under our Constitution under the First Amendment." Tr. of Oral Arg. at 56-58, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (No. 05-493). Notably, the Departments have never stated that the exemption is *compelled* by either RFRA or the First Amendment.

Second—and at issue in this petition—the Departments created an "accommodation" to the mandate for certain religious employers. The accommodation, unlike the exemption, does not purport to excuse employers from the mandate.[3] Nor does it operate automatically. Instead, it requires the employer to explain to HHS why it objects to providing contraceptive coverage—or certain types of coverage, as was the case in *Hobby Lobby*—and to provide its insurer's contact information. *Little Sisters of the Poor*, 2015 WL 4232096, at *8 (10th Cir. July 14, 2015). If the employer provides the requisite information, the Departments' regulations "shift responsibility to non-objecting entities" to "ensure[] that plan participants and beneficiaries will receive contraceptive coverage." *Id.* at *24.

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[3] Tr. of Oral Arg. at 57, *Hobby Lobby*, 134 S.Ct. 2751 (2014) ("The nonprofit religious organizations don't get an exemption. There's an accommodation there provided, but that accommodation results in the employees receiving access to this -- to the contraceptive coverage . . . .").

B. But Crafting Religious Accommodations Is Not a "Permissible Construction" of the Departments' Interpretive Authority

Before reaching the question of whether the accommodation violates RFRA, the threshold inquiry is whether the Departments' interpretive authority can justify the religious accommodation in the first instance. The ACA, without question, authorizes HHS to make health-care related decisions, Treasury to make financial-related decision, and Labor to make employment-related decisions. 78 Fed.Reg. 39892. Together, these Departments have the authority to interpret and implement the "preventive care" mandate. But the ACA conveys not even a hint that any of these agencies can make the delicate judgments that affect which religious groups should receive an exemption to avoid a violation of RFRA.

The government finds supports for its accommodation in a series of 80 statutes delegating authority to Treasury,[4] Labor,[5] and HHS.[6] 78

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[4] 26 U.S.C. § 7805; 26 U.S.C. § 9833.

[5] 29 U.S.C. §§ 1002(16), 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c.

[6] 42 U.S.C. §§ 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. § 36B, and 31 U.S.C. § 9701. The last series of cited provisions in the ACA—42 U.S.C. §§ 300gg through 300gg–63, 300gg–91, and 300gg–92—are also cited as statutory authority for the exemption. *See* 76 Fed.Reg. 46626. With the exception of 300gg-13, none of these ACA provisions have anything to do with the contraceptive mandate, and for many of them, the Departments lack the requisite interpretive authority anyway. For example, in *King*, the Court ruled that Treasury lacked the "expertise" to

Fed.Reg. 39892. But in their combined nearly 90,000 words, these four-score provisions make absolutely no reference to religion. There are a handful of references to a "church plan," which are defined under ERISA. The only conceivably relevant provision guarantees that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding conscience protection." 42 U.S.C. § 18023 (c)(2)(A)(i). If anything, this suggests a narrowing—not a broadening—of the Departments' power to burden conscience. There is no indication that Congress intended the Departments to make decisions in this realm. If the accommodation is *ultra vires*, *Hobby Lobby* provides the rule of decision and petitioners must be exempted from the mandate.

This is not to say that executive-branch agencies are unequipped to minimize burdens on religious free exercise. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Goldman v. Weinberger*, 475 U.S. 503 (1986). Federal agencies are always obligated to act in accordance with the Constitution and RFRA. When Congress is silent on how religion should be accommodated, however, administrative agencies do not get *carte blanche* to pick among religious groups that should be exempted from a mandate that imposes a substantial burden on religious exercise.[7] Congress could certainly legislate an accommodation in this

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broadly interpret one of these provisions, 26 U.S.C. § 36B. 135 S.Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–267 (2006)).

[7] As the Court held in *Hobby Lobby*, the application of the contraceptive mandate imposes a substantial burden on the free exercise of closely-held for-profit corporations. 134 S.Ct. at 2785. The same result would certainly hold for an order of nuns.

area, but this same action becomes *ultra vires* if taken by an agency lacking statutory authority to make such profound decisions.[8]

On this front, the Tenth Circuit made a fundamental mistake by conflating Congress and the executive branch. The court explained that "the Government enjoys some discretion in fashioning religious accommodations." *Little Sisters*, 2015 WL 4232096, at *36. But who is "the Government"? RFRA certainly extends to an "agency," 42 U.S.C. § 2000bb-2(1), but the statute by itself doesn't cryptically bestow on that agency the expertise and competency to resolve the tensions between religious liberty and public-health policy. The cases cited by the lower court involved decisions by Congress, not executive agencies "fashioning religious accommodations." *Little Sisters*, 2015 WL 4232096, at *36.[9] For example, the panel found

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[8] In their class complaint, petitioners charged that the accommodation was "arbitrary and capricious" under 5 U.S.C. § 706(2)(a), and "lacks legal authority." Little Sisters Complaint (Sep. 24, 2013), at 57-59, available at http://www.becketfund.org/wp-content/uploads/2013/09/Little-Sisters-of-the-Poor-and-Christian-Brothers-v.-Sebelius.pdf. The district court mentioned the issue, but did not rule on this basis. *Little Sisters of the Poor v. Sebelius*, 6 F.Supp.3d 1225, 1233 (D. Co. 2013). The court of appeals didn't address these claims. *Little Sisters of the Poor v. Burwell*, 2015 WL 4232096 (10th Cir. July 14, 2015).

[9] In *Cutter v. Wilkinson*, the Court stated, "This Court has long recognized that *the government* may . . . accommodate religious practices . . . without violating the Establishment Clause." 544 U.S. 709, 713 (2005) (citations omitted). There too, "the government" referred to Congress, in the context of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. 106–274, 42 U.S.C. § 2000cc *et seq.*

unobjectionable the fact that "religious employers" are given an *exemption* to the contraceptive mandate, while other religious non-profits only receive the *accommodation*: "The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a 'longstanding and familiar' distinction in federal law." *Id.* at *35 (citing *Priests for Life v. HHS*, 772 F.3d 229, 238 (D.C. Cir. 2014) and *Geneva Coll. v. HHS*, 778 F.3d 422, 443 (3d Cir. 2015)).

This argument falters because it was Congress that decided that churches "are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit organizations must apply for tax-exempt status if their annual gross receipts are more than $5,000." *Little Sisters*, 2015 WL 4232096, at *35, (citing 26 U.S.C. §§ 508(a), (c)(1)(A)). This was not a decision the Treasury Department reached based on its own independent judgment about the nature of religious organizations and whether they must seek tax-exempt status. Instead, it was the elected members of Congress who deliberated and determined that "churches, their integrated auxiliaries, and conventions or associations of churches" would receive an automatic "mandatory exception." *Id.* The Tenth Circuit's tax-code analogy collapses further because even religious non-profits with receipts over $5,000 will receive the *same exact* tax exemption as churches after they fill out the requisite paperwork. *Congress* determined that the additional burden on the non-profits to seek the exemption and file tax returns was a minimal intrusion, because ultimately the groups wind up with the same tax-exempt status. In contrast, the

petitioners here are still burdened by an altered version of the contraceptive mandate, even after providing HHS the requisite information.[10]

C. The Accommodation Fails to Respect the Departments' Narrowly Circumscribed Role in Avoiding Free-Exercise Burdens

There is an air of déjà vu to this case. In 1977, three years after the enactment of ERISA, the IRS general counsel concluded that an unnamed religious order of nuns, referred to only as the "Sisters," were ineligible to have a "church plan." *See* I.R.S. Gen. Couns. Memo 37266, 1977 WL 46200.[11] At the time, 26 U.S.C. § 414(e) provided that only a retirement "plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501" would qualify for a "church plan." *Id.* at *2. The IRS general counsel recognized that "neither the Code nor the Regulations defines the term 'church,'" so the agency had discretion to provide a reasonable interpretation. *Id.* at *3. Based on its study of the Internal Revenue "Code, Committee Reports, and Regulations," the general counsel found that "'carrying out the functions of a church' means carrying out the religious functions of the church,"

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[10] The Departments concede that "even if the accommodations were found to impose some minimal burden on eligible organizations, any such burden would not be substantial for the purposes of RFRA." 78 Fed.Reg. 39887.

[11] The IRS redacted the name of the order of nuns, but the description is quite similar to duties performed by the Little Sisters of the Poor. IRS Gen. Couns. Memo 37266, 1977 WL 46200, at *1-2.

and that "operating hospitals . . . is not a religious function." *Id.* at *5.

Congress profoundly disagreed. Three years later, "[w]ith the support of a broad-based coalition of religious organizations, Congress retroactively amended and expanded the church plan exemption." *Overall v. Ascension*, 23 F. Supp. 3d 816, 826 (E.D. Mich. 2014) (citing 94 Stat. 1208 (1980)). This new statute rejected the IRS's "narrow[]" interpretation that "include[d] only church organizations if they were focused on worshipful or priestly activities." *Id.* at 825-26. Congress instead specified that an organization "is associated with a church . . . if it shares common religious bonds and convictions with that church." 26 U.S.C. § 414(e)(3)(D). This would include organizations like the petitioners.

In 1983, the IRS general counsel published a memorandum departing from its 1977 opinion. Once again, another unnamed order of charitable nuns requested to have its retirement plan, which covered "lay employees of [the] religious order," qualified as a "church plan" and exempt from ERISA. IRS Gen. Couns. Memo 39007, 1983 WL 197946, at *1 (July 1, 1983). Under the revised statute, the IRS found that "the sisters are 'associated with' the Catholic Church by reason of sharing 'common religious bonds and convictions,'" so an employee "is considered as an employee of the Roman Catholic Church of the United States for purposes of the church plan rules." *Id.* at *4. As a result, the employees of the order were "eligible for coverage by a church plan." *Id.* at *6.

This history teaches two important lessons about the relationship between Congress, executive agencies, and the accommodation of religious liberty.

First, the Treasury Department in 1977 denied the nuns' initial request to have a "church plan," relying on its statutory discretion to interpret the word "church" narrowly. Through this language, Congress delegated the authority to decide what is and is not a church. But this delegation was set against the background principles that this issue was of great social, political, and economic significance. This was not a quotidian regulatory decision, but one that had the effect of burdening religious organizations.

Second, even with such a delegation, Congress has always retained the authority to avoid an "unjustified invasion" of "churches and their religious activities." S. Rep. No. 93-383, at 81 (1973) (Senate Report concerning ERISA). Through the political process, compromises were made that balanced the promotion of retirement benefits with the protection of religious liberty. *See also Gillette v. United States*, 401 U.S. 437, 445 (contrasting Congress's "deep concern for the situation of conscientious objectors to war" with "countervailing considerations, which are also the concern of Congress."). This sort of deliberation did not happen with the rulemaking process that led to the accommodation here.

In a different case, the Court noted that one regulated industry has a "unique place in American history and society," with "its own unique political history" that Congress has long protected. *Brown & Williamson*, 529 U.S. at 169. Yet surely religious freedom is more important to Congress, and to the nation as a whole, than the regulation of tobacco. In this case, "Congress' consistent judgment" must trump the Departments ill-equipped attempt to minimize burdens on free exercise. *Id.*

D. The Departments' Justifications for the Religious Accommodation at Issue Reflects Their Blinkered Approach to Protecting Religious Liberty

The Departments justified the religious-employer exemption to the contraceptive mandate on the grounds that "houses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed.Reg. 39887. Other religious associations, like the petitioners, meanwhile, received only the accommodation because their employees "are less likely than individuals in plans of religious employers to share their employer's . . . faith and objection to contraceptive coverage on religious grounds." *Id.* This is the same sort of blinkered distinction the Treasury Department drew in 1977, albeit with a permissible—but congressionally countermanded—interpretation of what a "church" is.

With respect to the contraceptive mandate, the distinction between religious employers was made beyond any permissible scope of the Departments' interpretive authority and in a manner that unjustifiably intruded onto free exercise. Consider the facts of this case. "Each Little Sister has chosen to follow Jesus Christ by taking lifetime vows to offer the poorest elderly of every race and religion a home where they will be welcomed as if they were Jesus himself, cared for as family, and treated with dignity until God calls them to his home." Little Sisters Complaint at 14. To that end, the "Little Sisters have

vowed obedience to the Pope, and thus obey the ethical teachings of the Catholic Church." *Id.* at 15. While the organization has lay employees like any house of worship, the Little Sisters have personally taken an oath that expresses their clear moral opposition to the contraception mandate. In her declaration, Mother Loraine Marie Clare Maguire—the provincial superior of the Little Sisters—explained that the organization "filed a detailed public comment with the government to inform them of our sincere religious objection to incorporating us into their scheme. But the government refused to exempt us." Supp. Decl. (Nov. 15, 2013), at 17.[12]

The Departments here crudely bifurcated houses of worship and their associates, based on a supposition that people who work for the Little Sisters—an obviously religious group of nuns who have vowed obedience to the Pope!—are less likely than church employees to adhere to the teachings of the Roman Catholic Church. This conclusory assertion serves as a testament to how out of their league the Departments were. Moreover, "[i]t is especially unlikely that Congress would have delegated this decision to" HHS, Labor, and Treasury, "which ha[ve] no expertise in crafting" religious accommodations "of this sort" without any statutory guidance. *King*, 135 S.Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–267).

Here the agencies are "laying claim to an extravagant statutory power" affecting fundamental religious liberties—a power that the ACA "is not

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[12] Available at https://www.scribd.com/doc/275549403/mother-lorraine-pdf.

designed to grant." *UARG*, 134 S.Ct. at 2444. The basis of the distinction between the exemption and accommodation is a delicate, value-laden judgment, one that cannot be made within the permissible bounds of the Departments' interpretive authority. Accordingly, the Departments' discovery of this "unheralded power" to decide which religious groups should and should not be exempted from a regulatory mandate that otherwise violates RFRA, must be "greet[ed] . . . with a measure of skepticism." *UARG*, 134 S.Ct. at 2444. The controversial contraceptive mandate, akin to the contentious "issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267 (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

To find that Section 300gg–13(a)(4) in particular affords the Departments the interpretive authority to balance religious liberty and public health, "one must not only adopt an extremely" broad interpretation of what providing "preventative care" entails, "but also ignore the plain implication of Congress's" long-standing commitment to the protection of religious liberty. *Brown & Williamson*, 529 U.S. at 160. *See United States v. Lee*, 455 U.S. 252, 260 (1982) ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."). Had Congress intended to give the Departments *carte blanche* to decide which religious institutions should be subject to the mandate, there would certainly have been a legislative statement to that effect. The fact that 42 U.S.C. § 300gg-13 and all

of the other cited provisions are entirely silent on the issue should be dispositive proof that the agencies lacked the interpretive authority to craft the regulations in the manner they did.[13]

The fact that the accommodation's rulemaking was premised not on health, financial, or labor-related criteria, but on the Departments' own subjective determination of which employees more closely adhere to their employers' religious views, "confirms that the authority claimed by" HHS, Labor, and Treasury "is beyond [their] expertise and incongruous with the statutory purposes and design." *Gonzales*, 546 U.S. at 267. If "Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

Now, if the Departments (or the courts) had determined that the "preventive care" mandate would violate RFRA as to a specific group, the correct remedy would have been to exempt them—or to change the list of contraceptives covered. Either approach would eliminate the substantial burden to the free exercise of religion under RFRA. The response would not have been to construct an elaborate framework that only purports to "minimize[] the burden on objecting organizations." *See* Brief for the Respondents in Opposition at 25, *Priests for Life v. HHS*, petition for cert. filed (No 14-1453), 2015 WL 4883185. The latter approach is reserved for Congress, the only branch of government elected to make decisions about *both* religious liberty and public-health policy.

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[13] In contrast, consider 26 U.S.C. § 5000A(d)(2), wherein Congress spelled out in great detail how religious objectors could receive an exemption from the individual mandate.

Congress did not authorize the Departments to pick and choose which religious groups—churches yes, nuns no—can be exempted from the mandate. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation."). In the absence of *any* statutory guidance, such interpretive authority is lacking.

II. The Court Must Decide This Case Because the Departments Lack "Expertise" to Answer This "Major Question" of Social, "Economic and Political Significance"

The Departments' decision regarding whether and how to offer a religious accommodation is the quintessential "major question" of profound social, "economic and political significance." *Brown & Williamson*, 529 U.S. at 1315. Even if the "preventive care" mandate is ambiguous in this regard, the accommodation cannot possibly be a "permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). "The idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the" broad purposes of the ACA "is not sustainable." *Gonzales*, 546 U.S. at 266-67. The accommodation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

In light of the narrow "breadth of the authority" that Congress has afforded to the Departments over this controversial issue, the Court is not "obliged to

defer . . . to the agency's expansive construction of the statute." *Brown & Williamson*, 529 U.S. at 160. Indeed, the Departments lack the "expertise" to make such a decision. *King*, 135 S.Ct. at 2489 (citing *UARG*, 134 S.Ct. at 2444. *Cf. Gonzales*, 546 U.S. at 266-67 ("The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.").

Again, the only possible textual hook to support the accommodation is the phrase "preventive care." 42 U.S.C. § 300gg-13(a)(4). This language provides no intelligible principle to the Departments that would allow them to consider how to accommodate religious liberty—one of the more controversial and finely tuned compromises leading to the Affordable Care Act's enactment.[14] The text of the ACA should leave this court "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

As then-Judge Breyer explained three decades ago, in such situations, "[a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the

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[14] Brief of Democrats for Life of America and Bart Stupak as *Amici Curiae* in Support of *Hobby Lobby* and *Conestoga, et al*, 13-354 & 13-356 (2014), at 1-3 (Pro-Life Caucus "offered means by which [ACA] could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion"); Josh Blackman, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 70, 75 (2013) (discussing how protection of conscience was crucial to ACA's enactment).

statute's daily administration." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). The "interstitial matter" of which contraceptives constitute "preventive care" does not embrace the far broader "major question" of which religious organizations should and should not be exempted from a regulatory mandate that violates RFRA, or how others should be accommodated. This is "an inquiry familiar to the courts: interpreting a federal statute to determine whether executive action is authorized by, or otherwise consistent with, the enactment." *Gonzales*, 546 U.S. at 249. *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) (providing that agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review").

Further, neither the express delegation to interpret "preventive care," nor the broad goals of improving "public health" and "gender equality," *Hobby Lobby*, 134 S.Ct. at 2779, can be used to justify a great substantive and independent power over free exercise. Because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), the Departments cannot alter the fundamental aspects of religious accommodation based on the broad purposes of the ACA. The narrow source of the statutory authority—which offers absolutely no religious exemptions for providing

"preventive care"—could not hide a mouse, let alone the woolly mammoth that is religious liberty. *Id.* In *Brown & Williamson*, the Court recognized that "[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U.S. at 159. If the FDA's attempt to regulate tobacco in *Brown & Williamson* was "extraordinary," then the Departments' decision to craft religious accommodations touching on profound questions of conscience is a *fortiori* beyond the pale. Deciding which religious groups should and should not be exempt from the contraceptive mandate, and how others should be accommodated, was "not a case for" HHS, Labor, and Treasury. *King*, 135 S.Ct. at 2489.

CONCLUSION

The Court should grant certiorari and supplement the questions that the petitioners presented with the additional question suggested by *amicus curiae*.

Respectfully submitted,

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